APPEAL NO. 93429

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On April 23, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that respondent (claimant) injured his back in the course and scope of employment and had good cause for giving no notice to his employer within 30 days. Appellant (carrier) asserts that claimant does not know when he injured himself, that claimant does not describe the incident with consistency, and that claimant had no good cause for not giving notice. Claimant made no reply.

DECISION

Finding that the decision and order of the hearing officer are supported by sufficient evidence, we affirm.

Claimant worked "off and on" for the same employing construction company for approximately 25 years. He had never been injured on the job before. Claimant acknowledged throughout that he could not remember the exact day of the injury and admitted that he did not give notice to any supervisor for months thereafter. Claimant was steadfast in saying, however, that he felt pain in his back when he was working with a retaining block used in conjunction with the wall of a building. At times he stated that he slipped and the block, weighing approximately 200 pounds, pushed him against the building; at times he said that he slipped while working with the retaining block, hurting his back; his claim (in the small space provided) indicated he lifted the retaining block, pulling his back. At the hearing, he added that when the block pushed him against the wall, it tore his safety belt. The belt was not introduced into evidence, but was shown and described as being tattered and dirty.

Claimant at the hearing stated that he worked with the pain of the accident until it got too bad in September. He also stated that his back continued to get worse between injury and his notice of a significant problem, possibly cancer, in September. He never used the word "trivial" or said that he thought the pain would get better. He repeated that he needed the work. He did state that cancer was suspected during the initial stages of medical treatment he began in September 1992. An MRI then showed a herniated disk and the question of cancer was overcome in early October 1992. The claimant stated that he needed surgery for the disk problem, although the medical records, admitted in evidence, were sketchy and do not state that surgery is needed. Claimant also testified that he still cannot work and is in pain.

As stated, the claimant's testimony about why he did not report his condition until September and his conclusion that he had been injured in October is based more upon the progress of the injury and his need for work, rather than upon any conception the claimant had that the initial injury was not serious. The claimant's testimony also showed, though, that he was not proficient with dates or understanding questions asked of him. The record

gave every indication that claimant's problem with dates, responding to questions, and even describing events with specificity was not out of any intent to confuse or avoid answering; the hearing officer as sole judge of the weight and credibility of the evidence (*see* Article 8308-6.34 (e) of the 1989 Act) could consider claimant to be a very honest person, who was not without certain limitations. With claimant's limitations and the testimony he did provide that the injury got worse, the hearing officer could infer that claimant did not consider the injury to be serious within the 30 days provided for notifying the employer. This inference is consistent with the benefit review officer's report, admitted in evidence, that shows claimant did not think the injury was serious. Although this issue was strongly contested by the carrier, it was for the hearing officer to decide. The evidence was sufficient for the hearing officer to decide that claimant had good cause to delay notice until the injury was seen as serious; he promptly notified the employer after concluding that it was serious. *See* Texas Workers' Compensation Commission Appeal No. 91030, dated October 30, 1991, and Texas Cas. Ins. Co. v. Crawford, 340 S.W.2d 110 (Tex. Civ. App. - Amarillo 1960, no writ), which Appeal No. 91030 cited.

Appellant cites Texas Workers' Compensation Commission Appeal No. 92577, as saying "[t]he date of injury seems obviously relevant to a dispute as to whether such injury actually occurred." The appeals panel has also referred to a variance in dates of injury in Texas Workers' Compensation Commission Appeal No. 91123, dated February 7, 1992, in upholding recovery for a claimant when the claimant "could best recall the date of injury in relation to another event rather than to a date on the calendar." That is not to say that the date of injury is not significant, and Appeal No. 92577 states a valid principle; nevertheless, even with evidence that the retaining wall job was not in progress until April, the hearing officer could choose to believe claimant in saying that it happened in March, and claimant's failure to identify the exact date is another matter for the hearing officer to consider in weighing the claimant's testimony. Appeal No. 91123, *supra*, also pointed out that there is no strict requirement for pleading the exact date of an injury and thereafter being restricted to proof as of that date.

Carrier also argued that the lack of consistency by claimant concerning his description of the accident indicates that the great weight of the evidence is against the decision. Claimant, when he addressed the accident in a statement or testimony, always referred to some manner of slipping in the mud; he also referred to a retaining block. Only when he received help from an attorney in filing out his notice of injury did he refer to the injury as one of lifting. Inconsistencies are also a matter for the hearing officer to decide. *See* Hochheim Prairie Farm Mut. Ins. v. Burnett, 698 S.W.2d 271 (Tex. App. - Fort Worth 1985, no writ). In considering the testimony of the claimant throughout the hearing, the hearing officer had sufficient evidence before him to conclude that the claimant had described the same event at different times in the best way he could.

The decision and order are supported by sufficient evidence of record and are affirmed.

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Joe Sebesta
Appeals Judge

CONCUR:

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Philip F. O'Neill
Appeals Judge

_____
Lynda H. Nesenholtz
Appeals Judge